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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 374

FRANCESCO TODARO, *Petitioner*

v.

THOMAS M. PEDERSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW.

The opinion of the court of appeals (Pet. 31-32) is not yet reported. The opinion of the district court granting respondent's motion for summary judgment (Pet. 26-31) is reported at 205 F. Supp. 612.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1962. The petition for a writ of certiorari was filed on August 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was afforded a fair opportunity in a deportation hearing to establish that his dissolved marriage was not contracted for the purpose of evading the immigration laws.

2. Whether a petition for review of a deportation order may be determined by the district court on a motion for summary judgment on the basis of the record of the deportation hearing.

STATUTE INVOLVED

Section 241(e) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U.S.C. 1251(e) provides:

> An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 212(a), and to be in the United States in violation of this Act within the meaning of subsection (a)(2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa, or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

STATEMENT

Petitioner, a native of Italy, sought judicial review in the United States District Court for the Northern District of Ohio of an order of deportation under Sections 241(a)(2) and 241(c) of the Immigration and Nationality Act of 1952. He had been ordered deported on the ground that he illegally entered the United States with a fraudulent immigrant visa on the basis of a marriage entered into less than two years prior to his entry, terminated within two years subsequent to his entry. The district court sustained the respondent's motion for summary judgment. The court of appeals affirmed. The evidence presented before a special inquiry officer may be summarized as follows:

In September or October 1955, petitioner had met Frances Garofalo, an American citizen, and her mother, Angelina De Leonardis, in Licata, Italy. They had previously seen each other on one previous occasion, in 1952, in the United States (R. 7, 26).[1] Petitioner, on inquiry, learned of her American citizenship (R. 27). After a short courtship, they agreed to marry (R. 28). Prior to the marriage, petitioner took Frances and her mother to three American consulates in Italy to find out whether he would be able to enter the United States (R. 52). On January 5, 1956, petitioner and Frances were married in a civil ceremony in Italy (R. 8, 28). It was agreed that the marriage would be solemnized by a religious ceremony in the United States (R. 28). Frances and her mother then returned to the United States. On June 29, 1957, peti-

[1] The immigration file has been lodged with the Clerk of the Court. The designation "R." refers to the transcript of the hearing before the special inquiry officer, which is a part of the file.

tioner entered this country on a nonquota immigrant visa (R. 2-3, 6). Mrs. De Leonardis paid for his passage (R. 53). After his arrival in the United States, his mother-in-law arranged for him to live apart from Frances. A church wedding was scheduled for October 19, 1957 (R. 51, 88). In September 1957, several days after arrangements had been made for the religious validation of the marriage, petitioner and Frances quarrelled, and Frances cancelled the church wedding (R. 31, 42-43, 95). On October 24, 1957, Frances filed a suit for annulment or divorce and on February 13, 1959, their marriage was terminated by divorce (R. 4; Exs. 4, 6).[2] The marriage had never been consummated (R. 24, 30).

There was evidence that petitioner precipitated the quarrel which led to the dissolution of the marriage and that it was at petitioner's suggestion that there was no church wedding in Italy (R. 28, 48, 42-43, 54-55). His ex-wife testified that petitioner told her he married her "just to use the American citizenship" (R. 29). Petitioner, for his part, testified that he was not responsible for the quarrel, that Frances wanted the church ceremony to be held in the United States, and that he married for love (R. 13-14, 21-22, 97).

Petitioner had been deported from the United States in 1953, after he had entered this country illegally as a stowaway. Prior to this deportation, he had proposed marriage to an American citizen and had given her $500 to travel to Italy to marry him (R. 4, 8-11).

The special inquiry officer, on the basis of "all the evidence in the record", held that petitioner had failed

[2] The trial judge refused to annul the [redacted] on the ground that, under Ohio law, divorce was the exclusive remedy where a marriage was contracted through fraud (Exhibit 10).

to sustain his burden of proof, *i.e.*, had failed to establish that the marriage was not contracted for the purpose of evading the immigration laws.

ARGUMENT

1. The government established a prima facie case of deportability by proving that petitioner's marriage was contracted within the two years prior to petitioner's entry and dissolved within two years after his entry. The statute, Section 241(*e*) of the Immigration and Nationality Act of 1952 (*see supra*, p. 2), placed upon petitioner the burden of showing, "to the satisfaction of the Attorney General," that he did not marry to evade the immigration laws. Petitioner complains, however, that the special inquiry officer refused to consider petitioner's exculpatory evidence.

An examination of the decision of the inquiry officer refutes petitioner's claim. The opinion first considered various undisputed matters: that in 1952 petitioner had previously entered the United States illegally as a stowaway; that he had unsuccessfully tried to marry an American citizen to frustrate deportation based upon this illegal entry; that the 1956 civil marriage to Frances Garofalo was never consummated; and that the planned religious ceremony was cancelled by Frances three days after all arrangements had been completed. The question as to the cause of the dissolution of the marriage was then discussed. While noting that some of the evidence was favorable to petitioner, the inquiry officer rejected his contentions that his mother-in-law had endeavored at all times to break up the marriage and that Frances sought its termination in order to have affairs with men. The examiner noted that petitioner's inquiry as to Frances' citizenship status made dubious his pro-

fessions that he married in good faith. The examiner then said: "There are many other areas wherein the parties disagree as to what actually occurred. I do not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or Government's witnesses is essential to the decision in this case. However, one matter is of importance. In his opinion granting the petition for divorce filed by Frances Garofalo, the trial judge indicated that he was granting the divorce rather than the plea for annulment because that was the proper remedy in Ohio where fraud in procurement of the marriage is established." The special inquiry officer then specifically found "on all the evidence in the record" that petitioner had failed to sustain the burden of proof imposed by statute and that petitioner had failed to establish that he did not marry for the purpose of evading the immigration laws.

Petitioner's assertion that the hearing officer based his decision solely upon the opinion dissolving the marriage is thus without merit. In context, the examiner's statement that he was not going to resolve certain matters meant only that he did not have to determine all the details on which the parties disagreed. It was sufficient for him to resolve the contested issue upon his rejection of petitioner's attempt to show that Frances and her mother deliberately sought to dissolve the marriage; upon petitioner's immigration history of 1952; and upon petitioner's inquiry as to Frances' citizenship status. In view of this evidence showing that petitioner's conduct was motivated by a desire to re-enter the United States, the inquiry officer had ample ground for finding that petitioner did not sustain his burden of proof. The examiner could have added that the undisputed testimony that petitioner's

civil marriage was never treated as a bona fide marriage was also indicative of fraud.[3]

2. There is no merit to petitioner's claim that the district court erred in sustaining the motion for summary judgment. The fact that the administrative record contained conflicting testimony did not preclude such action. It was the function of the special inquiry officer, not the district court, to find the facts. See *Kessler* v. *Strecker*, 307 U.S. 22; *In re Cartellone*, 148 F. Supp. 676 (N.D. Ohio), affirmed *sub nom. Cartellone* v. *Lehmann*, 255 F. 2d 101 (C.A. 6), certiorari denied, 358 U.S. 867; *United States ex rel. Ruggetti* v. *Neelly*, 207 F. 2d 281, 284 (C.A. 7); Section 242 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252(b). Cases in which the district judge is the trier of the facts are inapposite here. The only issue before the court was a legal one: whether there was substantial evidence in the administrative record to support the administrative findings.[4] Both courts below have ex-

[3] *Karagannis* v. *Brownell*, 251 F. 2d 882 (C.A. D.C.), a case arising under the Immigration and Nationality Act of 1937, is not in point. In that case the hearing examiner had found that the alien was deportable simply upon a finding that his marriage had been annulled and ruled that any explanation by the alien would be immaterial.

[4] An amendment of the 1952 Immigration Act provides that judicial review of deportation orders shall be in the court of appeals rather than the district court. Act of September 26, 1961, 75 Stat. 651, 8 U.S.C., Supp. III, 1105a. The purpose of the amendment was to hasten the final determination of deportation orders affecting aliens not in custody. See House Report No. 1086, 87th Cong., 1st Sess., pp. 22-30. This legislation recognizes that the scope of judicial review of deportation orders is a limited one. The amendment specifically provides that judicial review shall be determined solely upon the administrative records "and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

amined the transcript and answered that question in the affirmative. There is no occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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